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No. 03-1622

Supreme Court, U.S.
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In The
Supreme Court of the United States

MATTHEW FOUBERT, Officer,

Petitioner,

v.

CHERYL D. LYONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent Cheryl Lyons submits this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Petitioner Matthew Foubert.

None of the constitutional claims that Petitioner seeks to raise before this Court merit plenary review. Petitioner's principle complaints are that the Sixth Circuit did not look to the "totality of the circumstances" when determining that Officer Fouberts' actions did not merit qualified immunity and the Sixth Circuit did not rely on legal precedent in determining that a reasonable police officer would have had notice that his actions violated clearly established law.

STATEMENT OF THE CASE

On August 18, 1998, Officer Christine Keith of the City of Xenia, Ohio Police Department was investigating an alleged assault by a juvenile named Aiesha Ward. *Lyons v. City of Xenia*, 90 Fed. Appx. 835, 837 (6th Cir. 2004). The investigation culminated in Officer Keith and the Respondent Cheryl Lyons, the mother of the juvenile engaged in a confrontation in the dining room of Respondent's house. (Lyons Depo. at 190.) Officer Keith radioed for backup and Officer Foubert came charging into Lyons' house and immediately tackled her to the floor. (Id. at 192.) At the time of the incident the Respondent was forty-three years old, approximately five feet, four inches in height and weighed between 175 and 180 pounds. (Lyons Depo. at 175.) Officer Foubert, by comparison, was approximately five feet, eleven inches tall, and weighed between 230 and 240 pounds. (Fourbert Depo. at 8.)

The District Court denied summary judgment relief for Officer Foubert on his qualified immunity defense to Respondent's excessive force claim. The Sixth Circuit Court of Appeals held that there exists a general issue of material fact that Officer Matthew Foubert used excessive force when he tackled the Respondent to the floor after merely observing her and Officer Christine Keith engaged in a verbal argument. In applying summary judgment principles the District Court correctly held that the differing versions presented by Foubert and Lyons were genuine issues of material facts, which should be decided by a fact-finder and not on a motion for summary judgment.

Officer Foubert argues that he is entitled to qualified immunity from Ms. Lyons' Fourth Amendment claim. Under this Court's two-step analysis articulated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) the Sixth Circuit held that the Fourth Amendment prohibits excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor*, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In the case sub judice the Sixth Circuit majority held that a constitutional right had been violated. In the second tier of analysis of the *Saucier* test the court held that the right violated was clearly established in that an objective reasonable officer would have known that it was unlawful to tackle and forcefully subdue the plaintiff given the totality of the circumstances. Ms. Lyons, giving deference to her version of the facts, was not in physical contact with Officer Keith she was not trying to assault or commit physical harm to Officer Keith's person. Neither was she attempting to flee the scene and she was not in possession of a weapon. Admittedly, there was a verbal altercation and Officer

Foubert was responding to a call for assistance. That call did not indicate the presence of a weapon or the threat of assault. When Officer Foubert entered the room Ms. Lyons and Officer Keith were both standing and were not in physical contact. The Sixth Circuit held that given these factors it was objectively unreasonable for Officer Foubert to tackle Ms. Lyons and place his weight on her in a manner that stopped her breathing. Not only were his actions objectively unreasonable, but he had fair notice that they were unreasonable; therefore, he was denied the affirmative defense of qualified immunity.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED.

A. The Sixth Circuit Court correctly applied the "Totality of the Circumstances" test.

The decision below does not conflict with a decision of the United State Supreme Court, and should not conflict with any Court of Appeals in light of the landmark decision in *Hope v. Pelzer*, 536 U.S. 730, 177 S.Ct 2508, 153 L.Ed.2d 666 (2002). This Court's decision in *Hope*, establishes the proper analysis of qualified immunity, and the Sixth Circuit followed its precedent in this case and other circuits have followed it. *Treats v. Morgan*, 308 F.3d 868, 874-75 (8th Cir. 2002); *Hawkins v. Holloway,* 316 F.3d 777, 788 (8th Cir. 2003); *Savard v. Rhode Island,* 320 F.3d 2003 (1st Cir. 2003). In *Vaughn v. Cox*, 316 F.3d 1210 (11th Cir. 2003), cert. denied, 123 S.Ct. 2252 (2003) an interesting anomaly exists following a decision in which the Eleventh Circuit on remand after *Hope* granted summary judgment based on Petitoner's qualified immunity defense and later

reversed itself without explanation. *See Vaughn v. Cox*, No. 00-14380, 2003 U.S. App. LEXIS 18066 (2003). Moreover, the analysis of qualified immunity by all United States Circuit Courts of Appeal must follow this Court's decision in *Hope*. Therefore, the issues raised by the Petitioner and Amici do not merit plenary review. The analysis of qualified immunity and the Sixth Circuit's decision to deny this immunity to Officer Foubert in the case at bar is consistent with this Court's decision in *Hope*. Furthermore the decision in *Hope* eliminates any meaningful conflict with other Circuit Courts of Appeal.

In an effort to construct a conflict among the circuits, where none exists, Petitioner avers that the Sixth Circuit did not properly apply the "totality of the circumstances" test. They pose an illusory, compartmentalized or segmented analysis in contrast with a holistic or an all-encompassing weighing of the various facts to determine both whether a constitutional violation has occurred and whether an officer's actions merit qualified immunity. Simply put the Sixth Circuit looked to the totality of the circumstances in reaching its decision. In the case at bar the trial court and the Sixth Circuit did not ignore the factors which occurred before the alleged tackling by Officer Foubert. Judge Julia Smith Gibbons, writing for the majority noted the undisputed facts that:

> "Officer Keith and Lyons were yelling at each other and "[i]t got loud." Officer Keith called for backup. Officer Foubert received the call for backup. When he received the call, Officer Foubert heard "muffled noises in the background." Officer Foubert answered Officer Keith's call for backup and ran into Lyons's house. Then, Officer Foubert used force to restrain Lyons."

Judge Gibbons then looked at the divergent accounts of facts and concluded that under Lyons account of what occurred Officer Foubert violated Ms. Lyons' constitutional right against excessive force. Citing Sixth Circuit precedent Judge Gibbons held that the denial of summary judgment in an interlocutory appeal was appropriate. *See Buckner v. Kilgore*, 36 F.3d 536 (6th Cir. 1994), *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994) and *Sova v. City of Mount Pleasant*, 142 F.3d 898 (6th Cir. 1998). Ms. Lyons account of the arrest was that at the time of the tackling she did not have any physical contact with Keith, and they were standing facing each other in an upright position when Officer Foubert rushed to her lifted her up in the air and threw her to the floor. Aeisha Ward, Ms. Lyons minor daughter who was present at the time of the arrest, characterized Officer Foubert's actions as "a football player tackle in which Officer Foubert used all of his strength". Judge Gibbons also took note of the accusations that once he tackled her to the floor Officer Foubert forced Ms. Lyons down to the floor placing his body on top of her in such a forceful manner that she had trouble breathing before throwing her to her right side and handcuffing her. In essence this was no mere tackling case. Both Judge Gibbons and Judge Tarnow, in his concurrence, correctly and thoroughly looked at the totality of the circumstances in finding the fact that Officer Foubert received a call for assistance and was responding to that call did not outweigh the other abovementioned facts under Lyons' version of the events. The Sixth Circuit held that given the totality of all the facts of the Lyons version a reasonable officer would know that it was a clear violation of established law to tackle a person he merely observes in a verbal confrontation with a fellow officer.

Judge Gibbons opined that a reasonable officer would [based on mere observation of Officer Keith and Lyons engaged in a verbal confrontation] know that tackling a person from a standing position to the floor then lying on top of them with his full weight such that it takes their breath, is a violation of clearly established law and such knowledge prevents the award of qualified immunity.

Officer Foubert did not have facts that Lyons was possibly armed or posed a danger of having a weapon. The initial investigation, which caused Officer Keith to enter the Lyons home, was an alleged assault committed by juveniles. The crime that Lyons was charged with was not a serious crime. Petitioner is incorrect when he asserts that Judge Gibbons, and the majority, only took into account the single fact that Officer Foubert saw Lyons and Officer Keith standing and having a verbal altercation. The Petitioner does not address the fact that the majority decision also noted that Lyons' version of the facts consisted of more than mere tackling.

Judge Gibbons and Judge Tarnow weighed all of the aforementioned facts; they did not base their decision solely on the fact that Foubert did not see Keith and Lyons in a physical altercation. The majority held that under the totality of the circumstances Officer Foubert was not entitled to qualified immunity.

II. THE SIXTH CIRCUIT ARTICULATED LEGAL AUTHORITY IN *HOPE V. PELZER* SUFFICIENT TO DENY OFFICER FOUBERT QUALIFIED IMMUNITY.

The Petitioners and Amici's arguments that the majority erred in not relying on prior cases on all fours with the case sub judice's alleged constitutional violation, is erroneous. In *Hope* this Court specifically stated that it was error for the Eleventh Circuit to require that the facts of previous cases and the case at bar must be materially similar. This Court placed the focus of scrutiny on insuring that officers are on notice that their conduct violates citizens' constitutional or statutory rights. Following this court's decision in *Hope* government officials must look not only to the qualified immunity case law but also to the reasoning of the cases when determining the constitutionality of their conduct, and precedent cases do not have to be fundamentally similar to the case at issue but only needs to give fair warning to the government official(s) that their conduct crosses the line.

Judge Gibbons opined that Officer Foubert had fair warning that his actions violated the Fourth Amendment's prohibition against excessive force. Judge Gibbons cited *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997), and reasoned that an officer could reason that if overly tight handcuffs could constitute excessive force then tackling could constitute excessive force as well. Moreover, she does not limit her inquiry to tackling alone, but also focuses her attention on his acts following the tackling. Again, Petitioner and Amici do not address the fact that this is not just an incident of tackling but is followed by other acts, which a reasonable police officer would know were excessive given the totality of the

circumstances. This particular set of facts as acknowledged by the majority and the minority present a "novel" situation in the Sixth Circuit. The Sixth Circuit's majority decision followed the precedent set in *Hope* when it reasoned that the novelty of an excessive force claim cannot be a shield when the act has not been specifically declared unlawful. "An officer cannot claim entitlement to qualified immunity merely because the very act for which he is challenged has not previously been declared unlawful. *Dickerson v. McClellan*, 101 F.3d at 1151, 1158 (6th Cir. 1996); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987)." Justice Gibbons quoted from *Saucier v. Katz*, 533 U.S. 194 at 205 (2001) in noting that excessive force claims arise from virtually "limitless factual circumstances." A reasonable police officer should know that tackling an individual he merely observes in a verbal argument with another officer is unconstitutional.

Judge Sutton cited *Santos v. Gates*, 287 F.3d 846 (9th Cir. 2002), and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), as specific case law in which the mere act of tackling has been held to constitute excessive force. In distinguishing these cases from the holding in *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), which was submitted as precedent by Judge Sutton, the majority noted that in *Smith* the plaintiff was engaged in physical contact with police officers, while in the case at bar under Lyons version Officer Keith and Lyons were not in physical contact when Foubert observed them prior to tackling her.

III. THE COURT SHOULD NOT USE THIS CASE TO CREATE AN EXCEPTION TO THE CONSTITUTIONAL-QUESTION-FIRST RULE

Petitioner asks this court for a Writ of Certiorari to create an exception to or limit the constitutional-question-first rule. This rule was articulated in *Saucier*, 533 U.S. at 194. In the case at bar the Petitioner asserts that by ruling that Foubert's actions violated Ms. Lyons right to be free from excessive force, and by doing so in the Sixth Circuit they have declared it unconstitutional for any police officer to tackle a person similar to the facts in *Lyons v. Xenia*, supra.

"The elementary justification for the doctrine is that public officials performing discretionary functions should be free to act without fear of retributive suits for damages except when they should have understood that particular conduct was unlawful." *Limone v. Dennis Condon* 372 F.3d 39 (1st Cir. 2004) *citing Davis v. Scherer* 468 U.S. 183, 104 S.Ct. 3012, 83 L.Ed. 2d 139 (1984). The history of qualified immunity in the area of constitutional torts seems to be inextricably bound to the concept that we are attempting to protect police officers who err in the boundaries of what is constitutional in a way that will be the least disincentive to vigorously pursue law enforcement while preserving the protection for citizens who are the victims of egregious police error or misconduct. In *Hope* the court took particular notice of the fact that the best way to maximize the objective of qualified immunity is to provide police officers or governmental officials with "fair notice" of what is constitutional and what is unconstitutional. The first prong of the *Saucier* test in ways clearer that the second prong articulates to the untrained legal mind unconstitutional acts by law enforcement officers and governmental officials.

To eliminate this judge-made rule would militate against the principle of legal precedent giving these individuals fair warning of what is constitutional and what is unconstitutional activity. A failure to follow the strict dictates of the Saucier test has been in some cases not fatal to a decision when the court concluded that a remand would produce the same results. *See Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003). Hence, the court should not eliminate the first prong of the *Saucier* test. The Writ of Certiorari requested by the Petitioner should be denied.

CONCLUSION

In sum, this Court held that established law must give fair warning to officials that their conduct is unconstitutional. That fair warning can be established by cases, which do not have facts, that are materially similar to the situation in which the individual officer finds himself. Plenary review being unwarranted, the Petition for Certiorari should be denied.

Dated: September 30, 2004

Respectfully submitted,

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